

October 21, 2014

EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: October 20, 2014



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	Bankruptcy Case
)	No. 14-30462DM
JOHN STEVEN METHENY,)	
)	
Debtor.)	Chapter 13
)	
JL BEVERAGE COMPANY, LLC,)	Adversary Proceeding
)	No. 14-3075DM
Plaintiff,)	
)	
v.)	
)	
JOHN STEVEN METHENY,)	
)	
Defendant.)	
)	

MEMORANDUM DECISION REGARDING CHAPTER 13 ELIGIBILITY

When John Steven Metheny ("Debtor") filed his chapter 7 petition and schedules, he listed an unsecured debt owed to JL Beverage Company, LLC ("JL") in the amount of \$5,355,582.24 and did not identify it as contingent, unliquidated, or disputed. JL thereafter filed an adversary proceeding to have its Nevada state court judgment in a somewhat lesser amount against Debtor declared nondischargeable under 11 U.S.C. § 523(a)(2), (4), and (6).

1 Debtor obtained new counsel, filed amended schedules showing
2 the debt as unliquidated and disputed, and moved to convert his
3 chapter 7 case to chapter 13 under the scream-or-die procedures of
4 B.L.R. 1017-1. Debtor sought conversion because section 523(a)(6)
5 is inapplicable in chapter 13 cases.

6 While the memorandum of points and authorities in support of
7 the conversion motion briefly set forth the Debtor's position that
8 he was eligible for chapter 13 relief notwithstanding the state
9 court judgment, the court made no such finding in the conversion
10 order. Rather, as no opposition was filed, the court simply and
11 routinely converted the case to chapter 13 pursuant to 11 U.S.C. §
12 706(a), which provides "[t]he debtor may convert a case under this
13 chapter to a case under chapter 11, 12, or 13 of this title at any
14 time, if the case has not been converted under section 1112, 1208,
15 or 1307 of this title. Any waiver of the right to convert a case
16 under this subsection is unenforceable."

17 Despite the broad language of section 706(a), section 706(d)
18 provides that "[n]otwithstanding any other provision of this
19 section, a case may not be converted to a case under another
20 chapter of this title unless the debtor may be a debtor under such
21 chapter." 11 U.S.C. § 706(d). These words expressly condition a
22 debtor's right to convert a case to one under chapter 13 on his or
23 her eligibility to be a "debtor" under chapter 13. *Marrama v.*
24 *Citizens Bank of Mass.*, 127 S.Ct. 1105, 1110 (2007) (holding that
25 the broad right to convert to chapter 13 contained in section
26 706(a) is always conditioned by the requirement of section 706(d)
27 that the debtor be qualified to be a debtor under chapter 13).

28

1 Around the same time that Debtor filed his motion to convert,
2 he also filed a motion to dismiss the section 523 adversary
3 proceeding. In particular, Debtor argued that issue preclusion
4 cannot apply to the Nevada state court judgment, that JL had not
5 alleged and cannot allege facts to support nondischargeability
6 under section 523(a)(2) and (a)(4), and that section 523(a)(6)
7 does not apply in a chapter 13 case. Prior to the hearing on the
8 motion to dismiss, the court tentatively ruled that it would
9 dismiss the (a)(2), (a)(4) and (a)(6) claims with leave to amend.
10 See September 2, 2014, Docket Text Order. The final sentence of
11 the tentative ruling directed Debtor's counsel to be prepared to
12 explain how Debtor is eligible to be in chapter 13 with a
13 liquidated, albeit disputed, judgment of more than \$5 million
14 against him.

15 Debtor argues that JL has waived any challenge to his
16 eligibility to be a debtor in chapter 13. The court need not
17 decide that issue because the court has not waived the right to
18 raise the issue sua sponte. See 11 U.S.C. § 105(a):

19 (a) The court may issue any order, process, or judgment that
20 is necessary or appropriate to carry out the provisions of
21 this title. No provision of this title providing for the
22 raising of an issue by a party in interest shall be construed
23 to preclude the court from, sua sponte, taking any action or
24 making any determination necessary or appropriate to enforce
25 or implement court orders or rules, or to prevent an abuse of
26 process.

27 When Debtor moved to convert to chapter 13, his counsel
28 stated:

29 Additionally, the Debtor falls within the debt limits 11
30 U.S.C. § 109(e) due to the fact that the pre-petition claim
31 of JLB is an unliquidated and disputed claim.

32 Dkt. No. 23 in Case No. 14-30462, 3:1-2.

1 This statement absolutely incorrect. The JL judgment,
2 however disputed, was liquidated to the penny.¹ The inescapable
3 conclusion was and is that Debtor is ineligible to be in chapter
4 13.

5 JL contends, and the court agrees, that the judgment debt is
6 liquidated and noncontingent and thus precludes Debtor from
7 proceeding in chapter 13. The amount of the debt is "readily
8 ascertainable" from the judgment itself, even if debtor disputes
9 that amount. *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975
10 (9th Cir. 2001), citing *Slack v. Wilshire Ins. Co. (In re Slack)*,
11 187 F.3d 1070, 1073-75 (9th Cir. 1999) ("[I]f the amount of the
12 creditor's claim at the time of the filing the petition is
13 ascertainable with certainty, a dispute regarding liability will
14 not necessarily render a debt unliquidated. ... Even if a debtor
15 disputes the existence of liability, if the amount of the debt is
16 calculable with certainty, then it is liquidated for the purposes
17 of § 109(e)."); *Wenberg*, 94 B.R. at 635 (money judgment that
18 includes accounting and attorney fees constitutes a liquidated
19 debt and must be taken into account in determining a debtor's
20 eligibility for chapter 13 relief).

21 Debtor correctly contends that chapter 13 eligibility is not
22 an issue of subject matter jurisdiction and thus can be waived if
23 not timely raised. *Fed. Dep. Ins. Corp. v. Wenberg (In re*
24 *Wenberg)*, 94 B.R. 631, 636-7 (9th Cir. BAP 1988), *aff'd*, 902 F.2d

25
26 ¹ In an analogous situation the Ninth Circuit has recently
27 held that a pending appeal of a judgment does not render the debt
28 subject to a bona fide dispute, that would disqualify a
petitioning creditor under 11 U.S.C. § 303(b)(1). *In re Marciano*,
708 F. 3d 823 (9th Cir. 2013). There is no reason why the same
rationale would not apply here.

1 768 (9th Cir. 1990). The court disagrees with Debtor, however,
2 that the time for objecting to eligibility has passed. Debtor has
3 not confirmed his chapter 13 plan, and eligibility is an issue
4 that can and should be raised as an objection to confirmation.
5 See *In re Lewis*, 459 B.R. 281, 289-90 (N.D. Ill. 2011) ("As an
6 additional condition to confirmation of a Chapter 13 plan, 11
7 U.S.C. § 1325(a)(1) requires that the plan comply with all
8 applicable provisions of the Bankruptcy Code. Such applicable
9 provisions include 11 U.S.C. § 109(e)[.]"). Absent entry of a
10 final order confirming the plan, no issues pertaining to
11 confirmation (e.g., compliance with other provisions of the
12 Bankruptcy Code such as section 109) are precluded or waived. And
13 a debtor cannot sidestep these issues by inserting language into a
14 conversion motion in an effort to bind the court, the trustee, and
15 creditors, particularly when that language is absent from the
16 conversion order.²

17 Consequently, the court will DISMISS Debtor's chapter 13 case
18 unless he converts the case to chapter 11 or chapter 7 within ten
19 days of the date of service of this order. If the case is
20 dismissed, the court will dismiss the adversary proceeding as
21 moot, and JL counsel's should upload an appropriate order. If the
22

23 ² Prior to the Supreme Court's decision in *Marrama*, most courts
24 (including this one) considered a one-time conversion from chapter
25 7 to chapter 13 to be automatic if requested by a debtor. After
26 conversion, issues of eligibility and ability to confirm a chapter
27 13 plan became justiciable. The court does not believe that
28 *Marrama* changed this approach, particularly as section 1325(a)
requires a plan to comply with the provisions of chapter 7 and all
other applicable provisions of the Bankruptcy Code.

1 case is converted to chapter 11 or chapter 7, Debtor's counsel
2 should upload an order granting his motion to dismiss the
3 adversary proceeding, with leave to amend all three counts within
4 fifteen days of the date of service of the dismissal order. If
5 that occurs, the court will hold a status conference on November
6 21, 2014, at 1:30 P.M.

7 *** END OF MEMORANDUM DECISION ***
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